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TABLE OF CITATIONS

CONSTITUTIONAL PROVISIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-147

BOB BULLOCK, ET AL., *Appellants*

v.

DIANA REGESTER, ET AL., *Appellees*

On Appeal from the United States District Court for the Western District of Texas

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BRIEF FOR AMICI CURIAE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AND TEXAS LEAGUE OF WOMEN VOTERS

INTEREST OF AMICI

The League of Women Voters of the United States is a non-partisan, voluntary association whose purpose is to encourage the informed and active participation of all citizens in government and politics. Open to all women citizens 18 years or older, the national League

has a membership of 160,000 in more than 1,360 local leagues throughout the United States, Puerto Rico and the Virgin Islands. The Texas League of Women Voters is an affiliate of the national League with approximately 4,300 members in 41 local chapters. From its inception, the United States League and its affiliates have worked at national, state and local levels to achieve equality of representation and the eradication of discrimination in voting.

In pursuit of these goals, amicus has long been especially concerned with reapportionment because it believes that fair apportionment is an absolute prerequisite of a democratic society, while unfair apportionment corrupts the political process and destroys confidence in it.

STATEMENT OF THE CASE

This is the second time in recent years that the apportionment and districting[1] of the Texas State legislature has been before this Court. The record in this case, seen in the light of Texas' history of congressional and legislative apportionment, permits only one conclusion; the plan challenged here was the result of a process which is a textbook example of how states should not be apportioned and redistricted, a process that was riddled with defects of constitutional significance. In short, Texas has not yet complied with the constitutional command of equality in voting repre-

[1] "Apportionment" refers to the allocation of legislative seats, "districting" to the drawing of boundaries. *Kilgarlin* v. *Martin*, 252 F. Supp. 404, 410, n. 1 (S.D. Tex. 1966), *reversed sub nom. Kilgarlin* v. *Hill*, 386 U.S. 120 (1967). Both are involved in this appeal. We shall follow the *Kilgarlin* court and call the whole process "apportionment."

sentation first applied by this Court in *Baker* v. *Carr*, 369 U.S. 186 (1962).

The story begins in 1963. A little more than a year after *Baker* v. *Carr*, the *Kilgarlin*[2] plaintiffs challenged the existing Texas apportionment. A three judge District Court declared the apportionment unconstitutional and ordered the legislature to reapportion constitutionally by August 2, 1965. *Kilgarlin*, 252 F. Supp. 411. The result was challenged again, as a racially discriminatory gerrymander; as an unconstitutional "crazy-quilt" mixing single-member, multi-member and floterial[3] districts, and as containing "unacceptable variations," in the population of districts, from the one man-one vote principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964). *Kilgarlin*, 386 U.S. 121-22.

The District Court found the floterial districts unconstitutional because of extreme disparity in population, 252 F. Supp. 419-21. It rejected the plaintiffs' other contentions, holding that they had failed to satisfy the burden of proof which the court imposed upon them. 252 F. Supp. 413-16, 428, 434-5. And it found "rational explanations" for the mix of single-member and multi-member districts, including "a desire to avoid cutting county lines" and a "policy" limiting the size of multi-member districts to 1,000,000 people and 15 representatives. 252 F. Supp. 443, 444.

This Court reversed *Kilgarlin*, n. 1, 386 U.S. 120 (1967). It approved the District Court's rejection of the floterial districts, and its holdings that the plaintiffs had not proved a racial gerrymander or an unconstitutional "crazy quilt." 386 U.S. 821. It disap-

[2] N. 1, *supra*.

[3] See *Kilgarlin*, 252 F. Supp. 419-424.

proved the District Court's assignment of the burden of proof on the population deviation issue. Following *Swann* v. *Adams*, 385 U.S. 441 (1967) this Court held that the state has the burden of justifying population variances of the size present in the 1965 Texas apportionment plan. 386 U.S. 122.

The Court also rejected the District Court's reliance on the state's "attempt to conform to the state policy requiring legislative apportionment plans to respect county boundaries wherever possible." The Court "was not convinced that the announced policy of the State of Texas necessitated the range of deviations between legislative districts which is evident here." 386 U.S. 123-4. Moreover, it found that the Texas policy permitted violation of county lines in order to conform to the one man-one vote principle, and that other apportionment plans had been presented "which respected county lines but which produced substantially smaller deviations from" one man-one vote. *Ibid.*

So the Texas legislature went back to the drawing board and eliminated the floterial districts. The 1970 census then required a new apportionment. The legislature was able finally to agree on a plan for reapportionment of the House but not of the Senate. House Bill No. 783, Ch. 981, Art. 195a-3, §§ 1-5 [1971] Vernon's Tex. Sess. Law Serv. 2974; *Graves* v. *Barnes*, 343 F. Supp. 704, 711 (W.D. Tex. 1972).[4] In such cases the matter is referred by the Texas constitution to a Legislative Redistricting Board whose members are, ex officio, the Lieutenant Governor (who presides over the Senate), the Speaker of the House, the Attorney

[4] The opinion below; amici cite to the Federal Supplement report.

General, the Comptroller of Public Accounts and the Commissioner of the General Land Office. Tex. Const. Art. III, § 28. The Board is required to "assemble" within 90 days after adjournment of the legislature and complete its plan within 60 days after that.

The 1971 legislature adjourned on May 31, 1971. The Board assembled on August 24, 1971, shortly before expiry of the 90 day period, intending to deal only with the problem of reapportioning the Senate. *Mauzy* v. *Legislative Redistricting Board*, 471 S.W.2d 570, 572 (Sup. Ct. Tex. 1971). Its 60-day life would end on October 23, 1971. In the meanwhile, however, a challenge had been filed to the legislature-drawn plan of reapportionment and redistricting of the House, and on September 16, 1971, the Texas Supreme Court declared the House redistricting plan void. *Smith* v. *Craddick*, 471 S.W.2d 375 (Sup. Ct. Tex. 1971). It found that the plan provided for "the wholesale cutting of county lines," *id.*, 471 S.W.2d 378. It thereby would violate Article III § 26 of the Texas Constitution which, the Texas Supreme Court held, forbids the creation of legislative districts which cross county lines. *Id.*, 471 S.W.2d 377-78. Of course this provision is subordinated to the U.S. Constitution and "a county may be divided if to do so is necessary in order to comply with the equal population requirement of the Fourteenth Amendment." *Id.*, 471 S.W.2d 377.

The Texas Supreme Court held that the plaintiffs had met their burden of showing that the plan violated Article III § 26 of the Texas Constitution by cutting county lines. 471 S.W.2d 378. The defendants—the Governor, Secretary of State and party and local officials—had the burden of showing that the cutting of county lines was necessary "to comply with the one-

man, one-vote decisions." But the defendants "offered no evidence. . . . If these districting requirements were excused by the requirements of equal representation, the [defendants] had the burden of presenting that evidence. They presented none." *Smith* v. *Craddick, supra*, 471 S.W.2d 378. So, on September 16, 1971, the plan was struck down.

The Legislative Redistricting Board, which had been in existence for nearly a month to reapportion the state Senate, was then asked to add the House to its labors. *Mauzy* v. *Legislative Redistricting Board, supra*, 471 S.W.2d 572. The Board declined, asserting that, a statutory plan having been passed, it lacked jurisdiction to do so and the judicial invalidation of the plan could not confer jurisdiction. In this impasse the Texas Supreme Court was asked for a mandamus. It held that the Board indeed had jurisdiction to reapportion the House because the legislature had failed to enact a valid plan, and "[a]n apportionment, which is invalid, for whatever reason, is no apportionment." *Mauzy, supra*, 471 S.W.2d 574.

The court was also asked to compel the Board to "apportion only into single-member districts." The court declined, for, it said, "apportionment involves the judgment and discretion of the Board." *Id.*, 471 S.W.2d 575. It assumed, however,

> that the Board will give careful consideration to the question of whether or not the creation of any particular multi-member district would result in discrimination by minimizing the voting strength of any political or racial elements of the voting population.

Ibid.

The Texas Supreme Court issued its decision in *Mauzy*, ordering the Board to reapportion the House, on September 27, 1971. On October 15, 1971, the Board adopted and issued a plan for reapportionment of the Senate. On October 22 it adopted and issued a plan for reapportionment of the House. The Senate plan created 31 single-member districts. The House plan divided 150 seats among single-member districts and 11 multi-member districts. While it divided Harris County (Houston) into 23 single-member districts it kept Dallas one at large, 18-member district and did the same in San Antonio and all other metropolitan areas.

Proceedings in This Action

Four lawsuits were promptly filed. One challenged the Senate plan for Harris County (Houston). Two challenged the House plan as providing for excessive deviations in population, and as perpetuating discrimination by means of the multi-member districts. A fourth challenged the House plan and the Senate districts in Bexar County (San Antonio). *Graves* v. *Barnes, supra,* 343 F. Supp. 708-10. A three-judge court was convened and the cases were consolidated. Two thousand pages of depositions were taken and a voluminous documentary record compiled. Trial of the cases consumed 3½ days and a trial transcript of 1000 pages was created.

The District Court decided the case on January 28, 1972. It rejected the challenges to the Senate plan and upheld the challenges to the House plan. One judge also would have declared the Senate plan for Harris County an unconstitutional racial gerrymander. 343 F. Supp. 744-49. One judge dissented to voiding the House plan in its entirety for unacceptable population devia-

tions from equality. 343 F. Supp. 749-53. But all three concurred in voiding the multi-member districts in Dallas and Bexar Counties.

The District Court found that the State had failed to justify either deviations from population equality or the difference between single-member Houston and multi-member Dallas (and other metropolitan areas) in the House plan by the existence and application of a consistent state policy. It found that the plan could not be justified by the Texas constitutional policy against cutting county lines, because 19 county lines were cut in the plan adopted, without explanation. 343 F. Supp. 714-15.

It found that in leaving Dallas, with 18 members and 1.3 million population, at large, the state violated its own policy, announced and relied on by the District Court in *Kilgarlin*, of dividing districts with more than 15 members and one million population. 343 F. Supp. 716-17, 723. It found that the Board had failed to follow the popular will in Dallas, 343 F. Supp. 721. It found generally that the procedures followed by the Board were so defective as to rob its work of the judicial deference to which a legislative enactment would be entitled. 343 F. Supp. 716-17.

The court found the Texas multi-member districts discriminatory. They discriminated in favor of wealth because it is much more costly to run in a large multi-member district than in a single-member district. 343 F. Supp. 720, 721. Two peculiarities of the Texas scheme, a requirement of a majority vote and the requirement of running for numbered "places" or slots, highlight the racial issue and permit a majority to submerge a minority. 343 F. Supp. 725. And specifically in Dallas and Bexar counties the court found

facts, in documented racial preference in elections and (in Dallas) in the existence of a predominantly white slate making machine, which aggravated the discriminatory effect of multi-member districts in those localities. *Id.*, 726-27; 731-32.

In short the court found that the plans "would operate to minimize or cancel out the voting strength of racial minority elements of the voting population." *Graves* v. *Barnes*, 405 U.S. 1201, 1202 (1972) (Powell, Circuit Justice).

The court ordered the state to reapportion before July 1, 1973. For the 1972 elections, however, the court itself divided Dallas and Bexar Counties into single-member districts. The State sought a stay of this order, which Mr. Justice Powell denied on February 7, 405 U.S. 2101. Among other reasons, Justice Powell referred to the "careful attention" to the case "by the three-judge court, the members of which were 'on the scene' and more familiar with the situation than the Justices of this Court," and to the District Court's "conscientious application of principles enunciated by this Court." 405 U.S. 1204.

The State appealed. Only one of the Senate challenges was appealed and the District Court was affirmed per curiam, *sub nom. Archer* v. *Smith*, — U.S. —, 93 S. Ct. 62 (1972). So only the apportionment of the Texas House of Representatives is before the Court.

The Board's Proceedings

The District Court, in assessing the process by which the Board adopted the reapportionment plan, concluded that the Board did not do "the sort of deliberative job contemplated by *Reynolds* as worthy of judi-

cial abstinence." 343 F. Supp. 717. The delicacy of the court's phrase considerably understates the defects in the Board's "deliberations."

As the Court found, the "Board never really acted as a Board. . . ." There was no concert among the members "with regard to the constitutional principles or even to any lesser policy guidelines." The Board

—met "for hearings only 4 times;"

—one member "did not pay much attention to the hearings;"

—"the full board did not even meet to approve the final plan; it was merely passed around;"

—"only 3 members of the board signed both plans;"

—"At no point in its deliberations did the board even debate or discuss the general issue of single member districts vs. multi-member districts."

343 F. Supp. 716.

Appellant's brief criticizes the court for faulting "not so much the plan as the method by which it was adopted," for requiring that the reason for population deviations from equality "be fully debated and explained" and for not giving weight to "the process of legislative compromise."

Now let us look at what happened.

The Cast

The Board consisted of the Lieutenant Governor, Ben Barnes, the Attorney General, Crawford Martin, the Lands Commissioner, Robert Armstrong, the Comptroller, Robert Calvert and the Speaker of the

House, Gus Mutscher. Barnes had been the Speaker of the House which had enacted the apportionment plan struck down in *Kilgarlin* and had been a defendant in *Kilgarlin, supra,* 386 U.S. 123, n. 2. Martin had been Secretary of State at that time, was also a defendant in *Kilgarlin, supra,* 252 F. Supp. 404, and had been a state senator before that (Martin Deposition, p. 6) Mutscher (recently convicted of bribery in the Sharpstown bank scandal [5]), had been chairman of the House committee that wrote the plan struck down in *Kilgarlin,* 252 F. Supp. 423. Calvert had been Comptroller for 23 years and had been in the Comptroller's office since 1930 (Calvert Dep. 6). Armstrong, elected Lands Commissioner in 1970, had been a member of the House since 1963 (Armstrong Dep., 6).

The two principal staff people were Robert Spellings, Barnes' executive assistant (Spellings Dep., 7) and Robert E. Johnson, Executive Director of the Texas Legislative Council, a statutory body of the state legislature headed by the Lieutenant Governor (Barnes) and the Speaker (Mutscher) with a staff usually engaged in drafting legislation (Johnson Dep., 7). Johnson had been a state representative from (and apparently a segregationist leader in) Dallas County (*id.*, 59-60; Pl. Ex. 77, 87).

How the Board Operated

The Board actually met only eight times. Some of these meetings were mere formalities, at which the Board adjourned without taking any action except to elect Martin chairman (Armstrong Dep., 10; Martin Dep., 8; *cf.* Calvert Dep., 8). Only four of the meet-

[5] State v. Mutscher et al., No. 4242-B, 104th District Court, Taylor County, Texas.

ings—all public—were of substance: public hearings on September 30 and October 6, and the meetings to adopt the Senate plan on October 15 and the House plan on October 22. Barnes missed the crucial October 6 meeting, which was wholly devoted to testimony in support of single-member districts in Dallas County (Armstrong Dep., 12-14; Barnes Dep., 7; 16-17 *infra*).

The Board otherwise never met at all, held "no executive sessions" (Martin Dep., 9, 120; Barnes Dep., 94). Indeed, the members troubled themselves little to learn each others' views (Martin Dep., 18; Armstrong Dep., 32-33, 44; Barnes Dep., 100, 136, 141; Calvert Dep., 11). They never took a vote on any of the substantive issues involved in reapportioning the legislature, (Martin Dep., 24, 115; Barnes Dep., 56, 98, 100; Armstrong Dep., 16). They didn't even debate or try to resolve the issues (Barnes Dep., 149; Martin Dep., 105; Armstrong Dep., 32).

Armstrong tried unsuccessfully to bring the matter of single vs. multi-member districts to a head at the Board's October 15 meeting but received only vague answers (Armstrong Dep., 12-13). The Board

> made no decisions as to the other [than Harris] metropolitan counties . . . they were, in effect deciding that those counties were to be given multi-member districts. . . .
>
> They just left the overall state plan drawn as it was, with Harris County divided, and with the others undivided.

(Johnson Dep., 25-27)

The crucial issue of single vs. multi-member districts was—except for Houston (Barnes Dep., 121)—never

decided at all but went by default. Dallas, for example, "never was really faced directly" (Barnes Dep., 95-96, 99). There was "just an assumption that if we had . . . a vote, that the vote would probably be three to two against" single-member districting (Barnes Dep., 98), or two against two, with Martin undecided (*id.*, 56), but for Barnes this was no more than an "intuitive judgment" (*id.*, 100).

In fact, not only was there no consensus, but there was decisive misunderstanding by members of each others' true views. Barnes and Armstrong knew that the two of them were for single-member districts throughout the state (Barnes Dep., 94; Armstrong Dep., 16), and Armstrong thought that if Barnes had been at the October 6 meeting a vote then would have been three to two *for* single-member districting with "time enough" to draw the lines (Armstrong Dep., 16; 16, 18, *infra*). Barnes, on the other hand, was afraid Martin was for multi-member districts, although Martin never had made his position clear (Barnes Dep., 56). In fact Martin "would have signed a plan either way," "had no fixed view . . . an open mind" (Martin Dep., 30-32, 43, 45-46; Spellings Dep., 20).

Barnes also felt that Mutscher and Calvert were strong for multi-member districts. But Barnes did not hear Calvert's views from Calvert; "he was quoted in the paper to that effect" (Barnes Dep., 136). In fact Calvert was willing to "let the other members of the Board take the lead . . . the Attorney General [Martin] and Mr. Barnes came up with a plan and [he was] willing to go along." (Calvert Dep., 66). And Mutscher, it turned out, opposed and refused to sign the final plan *because* he was opposed to leaving Dallas County at large; he wanted to cut it into six three-

member districts or three six-member districts (Mutscher Dep., 8-10). Mutscher, at the end, confessed himself "baffled" at the seeming irrationality of the plan (*id.*, 29).

As we have seen, the Board never deliberated as a body. So it was that Calvert relied on the staff "greatly;" he himself gave no consideration whatsoever to racial, ethnic or political factors, the interests of minorities, the common interest of the people of proposed districts, voting records or the dilution of minority voting strength (Calvert Dep., 19-28, 58). He gave "very little consideration" to the testimony presented on October 6, and regarded it as "all this crap" (*id.*, 63-66). And at the end he did not know what the plan he had signed did with Dallas County (*id.*, 47).

The only policy decision that was made was made by the Board "when they adopted the bill" (Johnson Dep., 22). As we shall see, that "policy decision" was already made, not by the Board, but by lack of time and lack of direction, guidelines or standards. And it was squarely contrary to the overwhelming weight of the evidence before the Board.

The Evidence Before the Board

The Board held two public hearings on the House plan, on September 30 and October 6. Members of the legislature, political figures, political scientists, a law professor, a church official and a professional polltaker testified.

On September 30, four members of the Texas House testified in favor of single-member districts (Tr. Sept. 30; 4-36). One, Rep. Reed, submitted a single member plan for Dallas (*id.*, 11-12). He testified that the at-

large system discriminates against minorities (*id.*, 7-9). He pointed out that if single-member districts were adopted "it would be very difficult to draw lines where the blacks would not elect a minimum of three and possible four members of the state legislature" (*id.*, 6). Board member Armstrong agreed (Armstrong Dep., 26, 52).

Rep. Blythe pointed out that it would be unconstitutional to single-member Harris County and not Dallas (Tr. Sept. 30; 23). This was echoed by Board members Armstrong and Barnes (*id.*, 65, 66). Martin, however, claimed a justification for the difference in the fact that Harris County had more highways, which made it easier to divide (Martin Dep., 24-25) (although in this respect Bexar County was still "further along", *id.*, 92).

Four representatives from Dallas opposed single-member districts, as did the chairman of the Dallas Democratic Executive Committee (which controlled the delegation) (Tr., Sept. 30; 43-62). The Republican chairman favored single-member districts (*id.*, 69-71) and pointed out that 298 of 302 witnesses who had appeared in Dallas before the House Redistricting Committee in hearings on reapportionment earlier that year had supported single-member districts (*id.*, 72). And it seemed at the hearing that the Board indeed favored single-member districts throughout the state (*id.*, 14, 36, 65, 66).

The October 6 hearing consisted entirely of testimony in favor of single-member districts in Dallas. Polls of the county showed a preference for single member districts of 49%-31% in 1966, rising to 58%-31% in January 1968 and 61%-27% in September

1968 (Tr., Oct. 6; 5, 72). Notably, Senator Oscar Mauzy testified that

> Mr. Johnson has advised me that he and his staff can effectively draw a single-member district plan in about two weeks—

and there were more than two weeks left to go. (*id.*, 46.) Mauzy submitted his own plan (*id.*, 74), and testified that the black elected officials in Dallas all favored single member districting (*id.*, 73-74).

The Board was presented with considerable evidence on the increased cost of running at large. Rep. Blythe compared the cost of running at large, $40,000, with running in a single-member district, $4,000 to $8,000 (Tr. Sept. 30; 20). A single Dallas County-wide mailing was estimated to cost $100,000 (Tr. Oct. 6; 36) and the total cost to run a complete campaign at large in Dallas was estimated at $180,000 (*id.*, 78-79). Barnes (Barnes Dep., 89, 131, 143), Armstrong (Armstrong Dep., 23) and Mutscher (Mutscher Dep., 52-55) all agreed.

While Dallas' people generally (Tr. Oct. 6; 5, 72; and see the correspondence Exhibits to the Martin Deposition) and the black community in particular (*id.*, 73-77; Martin Dep., 54) favored single-member districting, their views seemed to be outweighed by the "business-men" (Martin Dep., 55-56, 60; Calvert Dep., 44). Martin, at least, gave no weight to the Dallas polls (Martin Dep., 89-91). But the Board was certainly aware of one thing: anything but single-member districting would result in litigation (Tr., Sept. 30; 9, 35; Tr., Oct. 6; 52).

The "Creation" of the Plan

As we have seen, the Board had originally convened to deal only with the Senate. It was ordered to reapportion the House on September 27, after it had been in existence for more than half of its sixty day life (p. 6, *supra*). Nevertheless, except for the public hearings on September 30 and October 6, the Board did not even take up the question of the House until after the Senate plan was adopted on October 15. There was then just a week to go (Armstrong Dep., 16; Spellings Dep., 34).

Therefore one of the principal factors that caused the retention of multi-member districts in Dallas, Bexar and other metropolitan areas was lack of time. The Board had 23 days from the date of the *Mauzy* decision (Barnes Dep., 112) and "it could have been possible within the time left to come up with a single member" plan "for all the major metropolitan areas" (*id.*, 128; see p. 16 *supra*). Johnson said it would be "difficult" but it could have been done (Barnes Dep., 128). But the time was not used. With less than two weeks to go, Spellings told Martin that to divide the metropolitan areas "would be a terrific burden . . . from a time standpoint." On October 15, it was "tough" because the staff didn't "have the expertise" to draw a single member plan (Armstrong Dep., 26-28; Spellings Dep., 20). Still later it was to be "practically impossible" (Spellings Dep., 54-55). Armstrong "could never get a clear answer from the staff people" about whether "there was time to do it all," although there obviously had been time "to do Harris County" (Armstrong Dep., 18). In short, the staff's claim that there wasn't time to draw a single member plan "was a large factor" in a feeling that members of the Board seemed to have "that maybe it was too late to insist on

single member." (*id.*, 29). They "didn't have time to debate the [single-member] issue. We had to get the job done." (Barnes Dep., 149).

To "get the job done" the Board set its staff to work—but without any specific instruction or guidelines "except to follow the law" (Martin Dep., 34-35). The staff was never instructed on what it was to do about Dallas County or the other districts that were at-large in the House plan the legislature had enacted (*Ibid.; id.* 36, 39, 42, 88, 89). Martin gave the staff no more guidance than to follow "the Supreme Court decisions and the census tracts" (Martin Dep., 43), although Calvert felt that by electing Martin chairman they had delegated to him the responsibility to instruct the staff. Barnes did no better. As of October 10 "the staff still had no guidelines;" except for Harris County the staff had not yet "been advised whether to go for single or multi-member districts" (Barnes Dep., 115; see *id.*, 20). Armstrong did not think "anybody felt the need to instruct" (Armstrong Dep., 22).

The staff felt itself at sea. They "received no instructions one way or the other from any member of the redistricting Board as regards the treatment of Dallas, Tarrant and Bexar;" there was "no Board action" to give them "instructions what counties should be multi-member" (Johnson Dep., 79, 73). When the Board said "cut them up," as with Harris County, they "cut them up;" when the Board was silent, as with Dallas and Bexar, they didn't "cut them up" (*id.*, 74; see also *id.*, 17-21, 28; Spellings Dep., 19).

The staff received no instructions or guidelines not to minimize or dilute the voting strength of minorities (Johnson Dep., 28-9; 38-40, 51; Spellings Dep., 38-43,

44-46). Johnson and his legislative council staff, while familiar with minority population concentrations, never did "consider what the effect of the plan" was "going to be on the Mexican-American and Black areas" and were not "concerned that [they] might wind up with a plan that might dilute or minimize or cancel out the voting strength of those particular groups" (Johnson Dep., 32). Nor were they instructed to do so (*id.*, 35). Spellings never considered minority voting problems or any of "an amazing amount of data" on minorities that the House Redistricting Committee and its staff had put together (Spellings Dep., 42; 38-41), or even census data on black and Mexican American population concentrations (*id.*, 44-46). In short they didn't consider minority groups "top, side and bottom" (Johnson Dep., 40).

The staff in fact did all the work (Barnes Dep., 18-19; Johnson Dep., 13-14). It was their plan which was adopted (Martin Dep., 33). Yet "no special effort" was made "to be sure that the staff would . . . follow constitutional guarantees" (Armstrong Dep., 23). Without guidance, they sometimes followed the House plan drawn by the legislature (Johnson Dep., 14). The Texas Supreme Court's mandate to the Board, *supra* p. 6, to give "careful consideration" to whether multi-member districts would result in "discrimination by minimizing the voting strength of . . . political or racial elements" was ignored.

The job was done in a rush. The deadline for Board action on the House plan was Friday, October 22. Spellings began work on Tuesday, October 19 (Spellings Dep., 9-10). He drew the state map Tuesday evening and finished it Wednesday morning, drew the single member districts in Harris County Wednesday

night and presented the plan to the Legislative Council Thursday afternoon (Spellings Dep., 25-26, 28-29). Spellings, with only one assistant, redistricted the entire state in 48 hours; 24 hours were spent in checking populations, the plan was given to the members of the Board at 2:30 p.m. on Friday and by 4:00 p.m. three of them had approved it (Spellings Dep., 29, 32-33).

There were two reasons why Spellings' map districted Dallas, Bexar and other metropolitan areas at large. Spellings didn't "think there were the votes on the Board for single-member districts," although he had discussed this only with Armstrong—who was pro-single member districts (Spellings Dep., 18-19, 35). And, probably most important, he and his assistant Hooser had tried to draw single-member districts for Dallas and gave up "because it was just too complicated" (Barnes Dep., 87). None of the Board members had more than 48 hours to consider the proposed plan.[6] Martin, for example, did not know until he first saw the map on Tuesday that Dallas was to be at large (Martin Dep., 41-42) and he "consented to it at that time." Barnes made no changes in the final draft; it was difficult for him "to spend a great deal of time getting involved in details" (Barnes Dep., 48-49).

Spellings took the plan around, lining up the members' votes. He told Martin that Barnes and Calvert were "agreeable" (Martin Dep., 46-47, 86-87), Martin signed and the plan was adopted. As Barnes testified, by this time:

> The best interest might be served for us to go ahead and get this bill approved and let the legis-

[6] Armstrong had 48 hours (Armstrong Dep., 19), Mutscher 6 to 8 (Mutscher Dep., 23), Martin 24 to 48 (Martin Dep., 40), Barnes 36 (Barnes Dep., 50).

lature come back hopefully in 1973 and draw individual districts.

(Barnes Dep., 101).

That is exactly what the District Court's judgment has done.

Epilogue

This Court's refusal to stay the District Court's order dividing up Bexar and Dallas counties meant that in November 1972 representatives ran in those counties in individual districts. The predictions that single-member districting would .increase minority representation, *supra* p. 15, were borne out, providing *post hoc* proof that the multi-member system was indeed discriminatory.

In Dallas, there had never been more than one black legislator, and none at all before 1966 (Pretrial Stipulation). In the 1972 elections three blacks were elected. In Bexar, one Mexican American had been elected in 1961, re-elected in 1962 and defeated in 1964; a black had run and lost in 1969. There was a single Mexican American in the House from Bexar in 1971 (Trial transcript, 538). In 1972, four Mexican Americans and a black were elected.[7]

SUMMARY OF ARGUMENT

The court below based its rejection of Texas' plan on two grounds. First, the deviations from population equality and the difference in the treatment of Houston

[7] The election results are certified. Official Canvass of the General Election, November 24, 1972, Board of Canvasser's Office of the Secretary of State, State of Texas. The four Mexican Americans elected in 1972 in San Antonio were Robert Vale (re-elected) Matt Garcia, Joe Hernandez and Frank Madla. The black was G. J. Sutton. In Dallas the three blacks elected were Eddie Bernice Johnson, Paul Ragsdale and Samuel B. Hudson III.

from the other major cities in Texas were inexplicable. Deviations and differences alike were unrelated to any rational state policy consistently applied. These findings are overwhelmingly supported by the record in this case. Never, so far as any record shows, has a state been subjected to such a capricious, haphazard and undirected procedure for the drawing of a reapportionment plan. In these circumstances it is not surprising that neither the State's own earlier policies nor any other consistent policy were applied, and that the plan spewed out by this process was a coat that fit no one.

Second, the plan's creation of multi-member districts, in the context of Texas' history of discrimination against its two main minority groups, Negroes and Mexican Americans, is itself discriminatory. This Court's decision in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), expressly left open the situation present here. Here the record shows that the use of multi-member districts in Texas operates "to minimize or cancel out the voting strength of racial . . . elements of the voting population." Here Texas has a recognized history of racial discrimination in voting, the effects of which linger still. In Dallas a strong, white-dominated political machine has served to keep Negro representation at a bare minimum. In Bexar County racism defeated Mexican-American candidates who dared to run. In all multi-member districts the cost of running, so much higher than in an individual district, has fenced out minority (and therefore poorer) candidates.

The District Court's judgment was right. It should be affirmed.

ARGUMENT

I. The District Court Correctly Found That the Deviation in Population and the Differences in Multi- and Single-Member Districting Had No Rational Basis

Ever since *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court has required that state reapportionment plans reflect "as nearly . . . as is practicable . . . substantial equality of population among the various districts. . . ." *Id.*, 577-78. While this standard does not imply a rule of precise mathematical equality, it does require that, in each case, the State make "an honest and good faith effort" to achieve the "overriding objective" of population equality. *Ibid.* This Court has stressed that all apportionment schemes—whether state or congressional—must adhere to the following principles: 1) they must be based "substantially on population;" 2) in no instance may the "population principle [be] diluted in any significant way;" 3) any deviations from population equality must be minor and must be based on "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds* v. *Sims, supra*, 377 U.S. 578-79.

The crucial issue in all reapportionment cases is not the size of the population variance. It is, rather, whether the plan itself reflects a "good faith effort" to minimize these deviations, and is the result of a rational, consistently applied policy. There is no automatic point "at which population variances suddenly become *de minimis.*" *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1969). To rule otherwise would vitiate the "fundamental goal" of achieving equal population "as nearly as practicable."

As the Court explained in *Kirkpatrick*:

> The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case.... [T]he "as nearly as practicable" standard requires that the State make a *good faith effort* to achieve precise mathematical equality. See *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964).

394 U.S. at 530 (emphasis supplied).[8]

Each apportionment scheme must be scrutinized in the context of conditions existing in its particular state. See *Reynolds* v. *Sims, supra.* A plan may be based on considerations which, although valid in one state, may be held invalid in another because of the different circumstances there. *Reynolds* v. *Sims, supra,* 377 U.S. 578; *see, e.g., Burns* v. *Richardson,* 384 U.S. 73, 93-97 (1966). There are, in short, no magic formulae and no

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[8] Although *Kirkpatrick* was concerned with congressional districting, the Court invoked *Reynolds*, a state apportionment case, to support its holdings. The Court's reasoning is, in any event, equally applicable to state apportionment plans. The "as nearly as practicable" standard and the requirement of a "good faith effort" have long been applied to state apportionment schemes. In short, "there is no reason to believe that the same principles are not applicable to state legislative districts. . . ." Comment, *Effective Representation and Multi-Member Districts,* 68 MICH. L. REV. 1577, 1591 n. 51 (1970). The lower courts have generally considered *Kirkpatrick* relevant in scrutinizing the validity of state apportionment plans. See, e.g., Kelly v. Bumpers, 340 F. Supp. 568, 571 (D. Ark. 1972) *appeal filed,* No. 72-166, July 31, 1972; Sims v. Amos, 336 F. Supp. 924, 933 (M.D. Ala. 1972); *aff'd sub nom.* Baxley v. Sims, — U.S. —, No. 72-171, (Oct. 24, 1972); *Twiggs* v. *West,* — F. Supp. — (D. S.C. 1972) Mem. Op. at 4-5, 8 n. 18. And this Court has indicated support for that view Ely v. Klahr, 403 U.S. 108, 111 (1971).

magic numbers which will automatically immunize a plan from constitutional infirmity.

Under these standards, the Texas apportionment plan for its House of Representatives must fall. According to the State's calculations, the total deviation shown is 9.9%. The actual figure may well be substantially higher.[9] But even assuming 9.9% is the correct number, while this deviation might be upheld in other circumstances it is impermissible here.[10] Likewise impermissible is the distinction between the single-member districts in Harris County and the multi-member districts in the other major metropolitan areas.

The stated justification for the population deviation in the plan was the state policy of not cutting county lines, *Smith* v. *Craddick, supra,* 471 S.W.2d 375; Appellant's Br., 3-4, 18-20. The only possible justification for the distinction between Harris County and the rest of the state was a claimed state policy of cutting up

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[9] A more accurate estimate of the total population variance in the House plan is 24.3%. The State's method of calculation, which was questioned by the District Court, is of doubtful validity, as it uses a computation system disapproved in Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *rev'd on other grounds sub nom.* Kilgarlin v. Hill, 386 U.S. 120 (1967), and which is, in any event, squarely inconsistent with the *Reynolds* standard of representation.

[10] The fact that this Court upheld a larger deviation in Abate v. Mundt, 403 U.S. 182 (1972) [11.9%] is irrelevant. As the Court emphasized in that case, the *Abate* deviations sprang from a justification rational in the particular circumstances of that case. Nor is it helpful to point out that in other cases where apportionment plans have been held unconstitutional, the deviations were often greater than 9.9%. See, e.g., Sims v. Amos, 336 F. Supp. 924 (M.D. Ala. 1972), *aff'd sub nom., Baxley* v. *Sims,* — U.S. —, No. 72-171 (Oct. 24, 1972) [24.28%]; Howell v. Mahan, 330 F. Supp. 1138 (E.D. Va. 1971) [16.4%]; Wells v. Rockefeller, 394 U.S. 542 (1969) [13.1%]. These cases do not turn on the numbers themselves, but rather on the rationale behind the numbers.

only districts with more than 1,000,000 population and 15 members, *Kilgarlin, supra,* 252 F. Supp. 443, 444. As the District Court found, neither policy was in fact followed, *supra* p. 8.

A. Deviations in Population

The story of the creation of the House plan is told in detail *supra* pp. 10-22. While there is no evidence that the Board and the staff intended to create the resulting population deviations, "good faith" as defined in *Kirkpatrick, supra* pp. 23-24, requires some minimum attention and care. The sorry record of the Legislative Redistricting Board fails to meet even a minimum standard. Texas has failed to "articulate acceptable reasons for the variations," *Swann* v. *Adams,* 385 U.S. 440, 443-44 (1967), the deviations are not "rationally justifiable," *Lucas* v. *44th Colorado Gen. Ass.,* 377 U.S. 713, 735 n. 27 (1964), and the State employed no "orderly or objective method," *Kirkpatrick* v. *Preisler, supra,* 394 U.S. 537 (concurring opinion). The plan "has no rational basis," *Davis* v. *Mann,* 377 U.S. 687, 694 (1964) (separate opinion of Stewart, J.). It "reflects *no* policy but simply arbitrary and" (in this case particularly) "capricious action." *Baker* v. *Carr,* 369 U.S. 186, 226 (1962) (emphasis in original).

B. Single and Multi-Member Districts

The only justification given for dividing up Harris County but not Dallas, Bexar or other metropolitan areas was that highways made it easier to divide Harris, *supra* p. 15. In fact, as we have seen, the decision was made utterly by default; the Board never really decided what to do about Dallas and the rest of the multi-member districts, *supra* pp. 18-22. The scheme on its

face thus violates the *Reynolds* warning against plans that are "crazy quilts, completely lacking in rationality," 377 U.S. 568, and ignores the rule that reapportionment plans must be "free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964).[11]

II. In the Circumstances of This Case, Multi-Member Districts in Dallas and Bexar Counties Operate To Dilute the Voting Strength of Racial Minorities

A. The Constitutional Standard

Multi-member districts are not constitutionally permissible in all "instances or under all circumstances." At-large districting is invalid whenever it operates *"designedly or otherwise"* to "minimize or cancel out the voting strength of racial or political elements of the voting population," *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966) (emphasis added); that is, wherever there is evidence that members of a group have "less opportunity than . . . [others] to participate in the political

[11] State courts have looked with suspicion on plans, like Texas', which create a hodge-podge of single and multi-member districts. Absent a reasoned basis for such scheme, they cannot withstand constitutional scrutiny. Kruidenier v. McCulloch, 142 N.W.2d 355, 368 (1966) (Sup. Ct. Ia.) [reapportionment plan inexplicably making one county a multi-member district while dividing all other counties into single-member districts held invalid]; Drew v. Scranton, 229 F. Supp. 310, 326 (M.D. Pa. 1964), *vacated and remanded on other grounds*, 379 U.S. 40 (1964) [where 14 large counties were divided into single-member districts while 15 other large counties were inexplicably arranged into a "crazy quilt pattern of one, two, three and four multi-member districts," the plan was invalid]; see Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (1964) ("[A] legislative scheme which creates single-member districts and multi-member districts in an arbitrary manner [is] objectionable." 203 A.2d 573).

processes and to elect legislators of their choice." *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971).

This Court has been unprepared to void multi-member districts where the evidence of harm has been "highly hypothetical,"[12] where a group has simply shown political defeat at the polls[13] or where there has been reliance on mere "conjecture as to the effects of multi-member districting rather than demonstrated fact.[14] But at the same time, the "extremely objectionable feature[s]" of at-large districting, *Lucas* v. *44th Colorado Gen. Ass.*, 377 U.S. 713, 727 n. 13 (1964),[15]

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[12] *Fortson* v. *Dorsey*, *supra*, 379 U.S. 437.

[13] *Whitcomb* v. *Chavis*, *supra*, 403 U.S. 153.

[14] *Burns* v. *Richardson*, *supra*, 384 U.S. 88. "Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting." *Id.*, 88-89.

[15] In Reynolds v. Sims, 377 U.S. 533 (1964), this Court remarked on the "practical problems inherent in the use of multi-member districts." *Id.*, 579 n. 58. In *Lucas*, the Court labelled Colorado's multi-member county scheme "debatable" (although not necessarily "constitutionally defective.") 377 U.S. 732; 731 n. 21. The Court especially questioned the allocation of 17 representatives and 8 senators at large to Denver, noting, *inter alia*, the difficulties that would be encountered in analyzing an especially "long and cumbersome" ballot. *Id.*, 731.

> In *Burns*, the Court indicated that an invidious effect [might] more easily be shown if . . . districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one.
>
> 384 U.S. 88.

The Court also noted that a minority might demonstrate its submergence by showing that "by encouraging block voting multi-member districts diminish the opportunity of a minority to win seats." *Id.*, 88 n. 14.

and its potential for racial discrimination, see, e.g., *Perkins* v. *Matthews,* 400 U.S. 379 (1971), have not gone unnoticed.

In *Allen* v. *State Board of Elections,* 393 U.S. 544 (1969) this Court held that a change from single-member to at-large districting was covered by § 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, because at-large districting might well "nullify [Negroes'] ability to elect the candidate of their choice just as would prohibiting some of them from voting." *Id.,* 569. Federal law forbids "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Id.,* 565.

This warning was echoed in *Perkins* v. *Matthews,* 400 U.S. 379 (1971) where the Court held that Canton, Mississippi's switch to at-large districting required federal approval, even though multi-member districting had been part of state law since 1962 and even though blacks made up a numerical majority of the town's population:

> [T]he right of suffrage can be denied by the debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964).

400 U.S. 388.

The Court also cited the following congressional testimony:

> The history of white domination in the South has been one of adaptiveness and the passage of the Voting Rights Act and the increased black registration that followed has resulted in new methods to maintain white control of the political process.

> For example, state legislatures and political party committees . . . have adopted laws or rules . . . which have had the purpose *or effect* of diluting the votes of new enfranchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, faciltating the consolidation of predominantly Negro and predominantly white counties. . . .

Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee of the Judiciary, 91st Cong., 1st Sess., Ser. 3, p. 17 (1969) (remarks of Mr. Glickstein)

400 U.S. 389 (emphasis added).

Among other remarks cited was the following comment of Rep. McCulloch:

> A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis . . . and both physical and economic intimidation have been employed.

Id., 389-90 n. 8.

This Court has long recognized that a history of racial discrimination may transform a system or process neutral on its face into one whose effects are discriminatory. *Gaston County* v. *United States*, 395 U.S. 285 (1969); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). In light of this, the Court has concluded that "as a general matter" single-member districts are "preferable to multi-member districts" in judicially created apportionment plans. *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971). Therefore, where multi-member districts appear amid a tradition of racial conflict and state enforced segregation, they are closely scrutinized

and are often held invalid. See, e.g., *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965); *Connor* v. *Johnson*, 330 F. Supp. 506 (S.D. Miss. 1971), *remanded and stay granted* 402 U.S. 690 (1971), *suppl. order entered*, 330 F. Supp. 521 (S.D. Miss. 1971), *vacated and remanded sub nom. Connor* v. *Williams*, 409 U.S. 549 (1972); *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971), *aff'd as to invalidity of multi-member districts*, 457 F.2d 796 (5th Cir. 1971), *stay den.* — U.S. — (Oct. 6, 1971); *vacated and remanded on other grounds sub nom. Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972); *aff'd sub nom. Baxley* v. *Sims*, — U.S. —, No. 72-12 (Oct. 24, 1972), *cf. City of Petersburg* v. *United States*, C.A. No. 509-72 (D.D.C. 1972).[16]

In *Sims* v. *Baggett*, the court found that the multi-member districting provided in the Alabama House plan could not be explained by geometry, geography or equality of population. Taking judicial notice of the long history of racial discrimination in Alabama and of the absence of non-whites in the legislature, the Court concluded that the at-large districts in question were racially discriminatory in purpose and effect and could not stand. In *Bussie* the District Court approved

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[16] "[I]n view of the opportunities afforded [by at large districting] to discriminate against Negro Voters," the Attorney General has often prohibited their use in many areas covered by the Voting Rights Act of 1965. Letter from Ass't. Att'y. Gen. J. Leonard to La. Att'y Gen. Jack Gremillion, September 10, 1969; see also letter of Ass't Att'y Gen. Norman to Mississippi Att'y Gen. A. F. Summer, May 21, 1969; letters from Ass't Att'y Gen. Norman to Georgia Att'y Gen. A. K. Bolton, March 3, 1972 and to La. Att'y Gen. J. Gremillion, August 20, 1971, and to South Carolina Att'y Gen. McLeod, March 6, 1972 [objecting to multi-member districts for the Georgia, Louisiana and South Carolina legislatures.]

the special master plan creating single-member districts throughout Louisiana despite the fact that the plan violated the state policy of preserving traditional boundaries. The court cited the past exclusion of blacks from the legislature as proof of dilution. It found that multi-member districts would perpetuate but single member districts would "minimize dilution of voter strength. . . ." The court remarked that:

> [n]either historical boundaries nor state policy nor state constitutional provisions may be used as vehicles by which to deprive the people of their constitutional right to equal protection under the law or of their right to equal participation in the election process.

333 F. Supp. 457-58.

The Court also emphasized that:

> [s]ingle member districts are always to be preferred if the use of multi-member districts tends to dilute the voting strength of any minority group.

Id., 458.

Similarly, the court in *Sims* v. *Amos, supra*, adopted single-member districting throughout the state of Alabama, not only on the grounds of population equality, but also because of

> the long history of racial discrimination evident in Alabama . . . in Alabama it is reasonable to conclude that multi-member districts tend to discriminate against the black population.

336 F. Supp. 936.

Forced to draw its own plan in *Connor* v. *Johnson, supra,* the District Court agreed with the plaintiffs

that large multi-member districts invidiously diluted the weight of black votes in Mississippi. The court felt, however, that there was not enough time before the next elections to draw single member districts. Nevertheless, this Court partially reversed the District Court for failing to divide Hinds County, which included Jackson, into single member districts.

In *City of Petersburg* v. *United States,* C.A. No. 509-72 (D.D.C. 1972) the District Court agreed with the Attorney General that the Virginia city's annexation plan, coupled with the use of at-large elections for local officers, had an invidiously discriminatory effect on the black population. Both the Attorney General and the court emphasized that the discriminatory effect of the annexation lay in the creation of an at-large system in the context of a change to a white majority population. See Mem. Op. 4, n. 2; 18. The three-judge court conceded that official segregation had abated in the state, that some blacks had been elected to city posts and that there was no evidence that the annexation was for the purpose of denying blacks the right to vote on racial grounds. Nevertheless, in the light of the history of racial discrimination in Virginia and in Petersburg, the city's attempt to restrict the political influence of blacks, the exclusion of blacks from political processes, the separate black/white political structures and widespread block voting (Mem. Op. at 9-12) the court felt that the plan diluted the weight of black voters, and had a "concomitant effect on their political influence which is a part of the bundle of individual rights embodied in the franchise as recognized as guaranteed by the Constitution. *Perkins* v. *Matthews,* 400 U.S. 379, 388 (1971) . . . ." (Mem. Op. at 17).

B. The Whitcomb Rule

The conditions that have led this Court and others to restrict the use of multi-member districts in the cases just discussed were notably absent in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). The difference was recognized in *Taylor* v. *McKeithen*, 407 U.S. 191 (1972), where the Court emphasized that a challenge to multi-member districting in Louisiana was not controlled by *Whitcomb*.

> The important difference . . . is that in *Whitcomb* it was conceded that the State's preference for multi-member districts was not rooted in racial discrimination, 403 U.S. at 149. Here, however, there has been no such concession and, indeed, the District Court found a long history of bias and franchise dilution in the State's traditional drawing of district lines.

407 U.S. 194 n. 3.

In vacating the Fifth Circuit's order, the Court implied that a state with a blatant history of racial discrimination may have an affirmative obligation to take measures to overcome the effects of past dilution of black votes. Likewise, the District Court in *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972), distinguished *Whitcomb* from the situation before it, noting that

> *Whitcomb* arose in Indiana, a state without the long history of racial discrimination evident in Alabama.

336 F. Supp. 936.

The record in *Whitcomb* showed the following: 1) Indiana had had a civil rights law since 1885 (and had enacted a new one in 1969); 2) the state had suffered no incidents of racial discrimination after 1926;

3) votes were cast along party lines rather than along racial lines; 4) blacks were influential in the processes of Marion County *and* in both parties. They actively assisted in slate making, and were vital in delivering needed votes.

In short, the record indicated that the Negro minority was able to form coalitions and to participate freely in the political life of Marion County. As the Court remarked, there was simply "no indication that this [black] segment of the population [was] being denied access to the political system," 403 U.S. 155, or that they "had less opportunity than did other Marion County residents to participate in the political process and to elect legislators of their choice." 403 U.S. 149.

Against this background, it was clear that if the voting power of Marion County blacks were cancelled out, it was by "political defeat at the polls," not by virtue of any invidious discrimination created or aggravated by multi-member districting. 403 U.S. 153. The disproportionately low numbers of legislators from the black "ghetto" area "emerge[d] more as a function of losing elections that of built-in bias against poor Negroes." *Ibid.*[17]

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[17] In attempting to prove that at-large districting diluted their votes, the plaintiffs showed: 1) that the blacks of Marion County—located in a ghetto area—had special interests in certain issues which were different from the interests of the non-ghetto residents; 2) that they had been underrepresented in the past ten years in the legislature; 3) that at-large districting facilitated the high degree of party control over nominations and over the voting of the delegation, thus making it more difficult for a minority group to exercise influence over a legislator. Noting that plaintiffs were in effect arguing for separate representation to reflect their special interests, the Court made it clear that no constitutional principal demanded that a certain portion of seats be "reserved for ghetto residents serving the interests of the ghetto majority." 403 U.S. 154.

The decision in *Whitcomb* rested on the fact that on the face of the record blacks in Marion County were essentially no different from any other political group. Like other minority interests, they frequently suffered defeat at the polls. Failure to win representation in the give-and-take of open competition and normal political activity could not be considered the result of invidious discrimination.

But not all minority groups are able to form alliances with other interest blocs or to join freely in the political process. If a segment of the population is "denied access to the political system," its opportunity for political interplay, and thus for exerting influence, disappears. In this situation, government officials find that they need not be politically accountable to the shut-out minority, whose votes become essentially meaningless. Such a situation is impermissible in a representative democracy and any device which perpetuates it is constitutionally suspect.

The Court indicated its awareness of these problems in *Whitcomb* by giving a narrow scope to its holding. The validity of multi-member districts containing politically unsuccessful minorities was conditoned on the absence of evdence that these minorities had any "less opportunity" to participate in the political process than did other groups. Th[illegible]e Court expressly left open an attack upon at-large voting schemes where minorities could show effective exclusion from the political system.

When minority groups—especially racial minorities—are isolated by the dominant white majority, they become effectively excluded from the political system. In the language of *Whitcomb*, they certainly have "less

opportunity . . . to participate in the political process and to elect legislators of their choice." 403 U.S. 149. In such a case an isolated minority has no influence at all.

The isolation of a racial minority can be shown in many ways. It can be shown by a history of racial discrimination, both public and private, which has resulted in enforced poverty, educational neglect and low voter participation. Evidence that candidates are picked without regard to minority interests, that voters split along racial lines or the racial appeals are employed further indicates a "fencing out" of racial minorities. When multi-member districts appear amid such a situation they aggravate the existing racial isolation by making it more difficult for minorities to make their voices heard. In such a context multi-member districts operate as yet another device by which whites perpetuate their power over non-white groups.[18] It is for this reason that multi-member dis-

[18] It is interesting to note that more southern states (including Texas) initially used a combination of single and multi-member districting for their lower houses than did states in other parts of the country. In fact, 70.5% of all such states were in the South. National Legislative Conference and the Council of State Governments, REAPPORTIONMENT IN THE STATES, 23, 25, 26 (June 1972). This is not to imply, of course, that multi-member districts *per se* have an invidious purpose or effect whenever they are used in southern states. However, that part of the country has seen particularly widespread use of legal and extralegal techniques specifically employed for the purpose of disenfranchising blacks. See V. O. Key, SOUTHERN POLITICS, (Vintage Ed. 1949); E. C. Ladd, NEGRO POLITICAL LEADERSHIP IN THE SOUTH, 18-20 (1969); D. Mathews and J. Prothro, NEGROES AND THE NEW SOUTHERN POLITICS, 13-17, 166 (1966). Because of their discriminatory potential (see pp. 28-33 *supra*) multi-member districts should be carefully scrutinized whenever they are used in an area with a tradition of racial disenfranchisement—wherever that area happens to be.

tricts have been found suspect in areas where the racial divisions in society are especially apparent. See generally p. 31 *supra* and cases cited.

C. The Conditions Presented Here

1. The State as a Whole

Texas is one of the many areas throughout the country which has had a virulent tradition of racial discrimination, extending into relatively recent times. As the District Court noted "[t]here exist innumerable instances, covering virtually the entire gamut of human relationships, in which the State has adopted and maintained an official policy of racial discrimination against the Negro." 343 F. Supp. 725; *see* cases cited *id.* nn. 15, 16.

Texas has also gone to great lengths to fence out blacks from the political and electoral process. *See*, e.g., *Nixon* v. *Herndon*, 273 U.S. 536 (1927) [white primary law held unconstitutional]; *Nixon* v. *Condon*, 286 U.S. 73 (1932) [white primary rule promulgated by Executive Committee of the State Democratic Party held unconstitutional]; *Grovey* v. *Townsend*, 295 U.S. 45 (1935) [white primary law adopted by state convention of Democratic party upheld]; *Smith* v. *Allright*, 321 U.S. 649 (1944) [exclusion of Negroes from the Texas Democratic primary held unconstitutional; *Grovey* overruled]; *United States* v. *Texas*, 252 F. Supp. 234 (W.D. Tex. 1966), *aff'd* 384 U.S. 155 [Texas poll tax held unconstitutional].

In Texas (and in Tennessee and Arkansas) the poll tax was recognized as "the principal formal barrier between the voter and the ballot box . . . ." V. O. Key, SOUTHERN POLITICS, *supra* 578. Adopted specifically

to discourage black voting, it posed a special problem for the black poor. *Id.*, 537 618,[19] *see* T. Dye, THE POLITICS OF EQUALITY, 18 (1971).

The white primary was considered to be an even "more important component of the system" to exclude blacks and more effective in restraining the Negro vote. Key, *supra* 555, 618; Dye, *supra* 18, Mathews and Prothro, *supra* 16. It, too, was adopted explicitly to disenfranchise the black population—supposedly, without offending the Constitution. Key *supra* 619, 621. In San Antonio, those Democrats apparently not benefiting from the black vote were among the staunchest advocates of white primary legislation. Key, *supra* 621.[20]

The State's segregationist and exclusionary policies toward blacks have also extended to the Mexican-American population.[21] See, e.g., *Hernandez* v. *Texas*, 347

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[19] By the time the poll tax went into effect in Texas, that state's disenfranchisement of the Negro was largely complete; "the Negro had [already] been persuaded to stay away from the polls." See Key, *supra* 533-35.

[20] Texas has traditionally been a one-party state. However, both Democrats and Republicans (such as exist) have been equally united in an anti-black position. See O. Douglas Weeks, *Texas, Land of Conservative Expansiveness*, THE CHANGING POLITICS OF THE SOUTH, 203, 205 (Ed. W. C. Havard, 1972). In Truman days, for example, the Texas Republican State Executive Committee adopted a resolution condemning the President's civil rights program. Key, *supra* 290.

[21] As the District Court emphasized "[b]ecause of long standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economies, health, politics and others. 343 F. Supp. 728.

U.S. 475, 478 (1954) [jury selection]; *Cisneros* v. *Corpus Christi Independent School District,* 324 F. Supp. 599 (S.D. Tex. 1970) [school segregation]; *Muniz* v. *Beto,* 434 F.2d 697 (5th Cir. 1970) [grand jury selection]. Mexican Americans are generally unassimilated into Texas life. Key, SOUTHERN POLITICS, *supra* 271. They have been traditionally subject to the "coercive influences usually brought to bear on depressed groups." *Id.,* 272.

Like blacks, Mexican Americans have been subject to "effective disfranchisement" in Texas. The barriers they face have been "similar in character if not in degree to that which discourages Negro voting in most of the South." *Id.,* 273. Their lack of political participation has not only been fostered by a "deficient educational system," as the District Court found 343 F. Supp. 731, but also by "the most restrictive voter registration procedures in the nation." *Ibid.*

Texas' past and current registration and election laws: the long residency requirement, *Beare* v. *Smith,* 321 F. Supp. 1100 (S.D. Tex. 1971), restrictions on assistance to illiterates, *Garza* v. *Smith,* 320 F. Supp. 131 (W.D. Tex. 1971), the numbered place system and the strict majority requirement for primaries have, in fact, limited and diluted the votes of both Mexican-American and black minorities. The place system and the majority rule are especially invidious. "[H]ighlight[ing] the racial element where it does exist" 343 F. Supp. 725, the numbered place system encourages minority isolation by ensuring that even if the majority is split, it can regroup and defeat the minority. Its potential for "curtailing minority voting power" is "clear." See *Dunston* v. *Scott,* 336 F.

Supp. 206, 213 n. 9 (E.D.N.C. 1972). The strict majority requirement, almost unknown outside the South, is also suspect. *Cf. Evers* v. *State Board of Elections Committee,* 327 F. Supp. 640 (S.D. Miss 1971).

As the District Court remarked:

> [W]hatever its constitutional status, it is clear that the majority system tends to strengthen the majority's ability to submerge a political or racial minority in a multi-member district.

343 F. Supp. 725.[23]

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[23] Any degree of discrimination built into an apportionment system voids that system. *Hadley* v. *Jr. College District,* 397 U.S. 50, 57 (1970); *Wells* v. *Rockefeller,* 394 U.S. 542, 546 (1969). When the majority and place systems are combined with a third system with discriminatory potential (such as multi-member districting) there is an inference of unconstitutionality. See *Jenness* v. *Fortson,* 403 U.S. 431, 437 (1971). In any event, it is beyond dispute that Texas has systematically excluded both blacks and Mexican Americans from its political life and has denied many of them access to the electoral system. This fact alone requires that the closest scrutiny be given to any at-large districting scheme in Texas which contains substantial racial minorities within its boundaries.

It should also be noted that suspect devices like the majority and place requirements were not present in Indiana and therefore not before the Court in *Whitcomb.* Nor did the Court confront a history of racial discrimination or evidence of irrationality in the plan. Both those elements appear in this case. As the court below pointed out, the Indiana apportionment plan, in contrast to the Texas scheme, treated all large metropolitan areas alike. 343 F. Supp. 722. In addition, proof that the expense of campaigning in large multi-member districts discriminates against poor candidates and their supporters was not presented in *Whitcomb,* but was presented here.

The presence of all these factors and their complete absence in *Whitcomb* are enough to distinguish the two cases on that basis alone.

2. Dallas and Bexar Counties

The District Court found that both Dallas and Bexar counties reflected the statewide pattern of racial discrimination and political isolation of minority groups.

Dallas. The record showed that not only was the black community poorly represented in the legislature, but that the black minority had been "effectively excluded from participation in the Democratic primary selection process." 343 F. Supp. 726 n. 17. The court below found that the white-dominated slating organization—the Dallas Committee for Responsible Government (DCRG)—never considered the interests of the black community in slating candidates, and slated blacks, if at all, on the basis of their race, not on the basis of their sympathy with black concerns. Furthermore the court found that black leaders participated only at the command of the DCRG—and only in recruiting candidates if the DCRG saw fit to slate a Negro. As the District Court remarked:

> Negroes in Dallas County are permitted to enter the political process in any meaningful manner only through the benevolence of the dominant white majority. If participation is to be labeled "effective" then it certainly must be a matter of right, and not a function of grace.

343 F. Supp. 727.

The record also showed continuing racial prejudice against blacks in Dallas County and the use of racial

appeals in political campaigns[23] as late as 1970. *Id.*, 726-27.

In short, the blacks of Dallas County have been denied a realistic opportunity to join in the political life of the area. Under these circumstances, multi-member districts are invidiously discriminatory. Accordingly, the District Court held them impermissible in Dallas.

Bexar. The evidence showed, and the District Court found, that Mexican Americans in Bexar County continued to suffer racial discrimination, both private and public. The court further found that Mexican Americans live in segregated communities in the most deprived areas of the city, and suffer from substandard housing, severe poverty, and high unemployment. 343 F. Supp. 729 n. 18a; 730.

Compounding these difficulties, the court found, is an extreme cultural and political isolation, due, in part, to a language disability and "fostered by a deficient educational system." The court concluded that this isolation explained the low level of political participation among Bexar County Chicanos—and among Mex-

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[23] Commentators have noted that this fixation with the "race question," common throughout the South, has tended to smother conflict over other issues and has stifled the development of a two party system. V. O. Key, SOUTHERN POLITICS, *supra* 142, 315-16; *See* Matthews and Prothro, *supra* 370-372. A desire to subordinate the Negro (and other racial minorities) has in fact determined the entire framework of Southern political life. V. O. Key, SOUTHERN POLITICS, *supra* 8-9, 665; Dye, *supra* 17-20; 107-08; see Matthews and Prothro, *supra* 13-18, 332; *passim*. In this respect, Bexar County reflects a pattern not unique to Texas alone.

ican Americans throughout Texas. The court summarized:

> This cultural and language impediment, conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political process in Texas even longer than the Blacks were formally denied access by the white primary.

343 F. Supp. 731.

The court also found that voters divided along racial lines in elections contested by Chicano candidates, with Anglo-Americans tending to vote overwhelmingly against Mexican-American candidates. (The lack of a two-party system in Bexar County cuts off any opportunity to form a viable minority opposition. It also eliminates the competition for minority support, found so critical in *Whitcomb*.)

Lastly, the evidence demonstrated that the prohibitive cost of running in the county at large had "inhibited the recruitment and nomination or election of Mexican-American candidates for the Texas House of Representatives." *Ibid.* In short:

> [a]ll these factors confirm the fact that race is still an important issue in Bexar County and that because of it, Mexican Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities.

Id., 732.

In light of the fact that Mexican Americans have been "denied access to the political processes through

years of discrimination," the court concluded that "the remedying of State action is both appropriate and constitutionally compelled." *Id.*, 733.

Thus, the court ordered single-member districts for Bexar County on the grounds that single-member districting would aid in remedying the effects of present and past discrimination. Multi-member districts, on the other hand, would simply perpetuate the isolation and political impotence of the Chicano community.

The court's decision conformed scrupulously to the *Whitcomb* standards. The fact that Mexican-American candidates have not always been rejected by the white population in Bexar County is irrelevant. Proof of total exclusion from the political system is unnecessary. The *Whitcomb* standards simply demand a showing that the minority group in question have "less opportunity for success." That was amply demonstrated—by the poverty, isolation, low voting rates, and effective exclusion of Mexican Americans from the political, social and economic life of the County.

The District Court agreed with this Court in *Whitcomb* that minorities are not automatically entitled to representation. But nothing in its holding implied to the contrary. The thrust of the court's opinion was simply that "a State may not design a system that deprives such groups of a reasonable chance to be successful." 343 F. Supp. 734. That reasoning is fully consistent with, and is indeed compelled by, the rationale of *Whitcomb*.

CONCLUSION

The Equal Protection clause does not permit states to create apportionment plans that inexplicably discriminate among voters or which result in dilution of the votes of minorities. The District Court's judgment should be affirmed.

Respectfully submitted,

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